1986

David L. Wilkinson, Attorney General for the State of Utah, and Edward T. Alter Stater Treasurer for the State of Utah v. Utah Technology Finance Corporation, et al. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

DAVID L. WILKINSON, Attorney General for the State of Utah, and EDWARD T. ALTER State Treasurer for the State of Utah,	)	
Plaintiffs-Appellant,	)	Case No. 860097
vs.	)	Category 14 (Accelerated)
UTAH TECHNOLOGY FINANCE CORPORATION, et al.	)	
Defendants-Respondents.	)	

BRIEF FOR PLAINTIFF-APPELLANT

APPEAL FROM THE DECLARATORY JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT

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LIST OF ALL PARTIES

UTAH TECHNOLOGY FINANCE CORPORATION,

Plaintiff-Respondent,

vs.

DAVID L. WILKINSON, Attorney General of Utah,

Defendant-Appellant,

DAVID L. WILKINSON, Attorney General for the State of Utah, and EDWARD T. ALTER State Treasurer for the State of Utah,

Plaintiffs-Appellant,

vs.

UTAH TECHNOLOGY FINANCE CORPORATION, and its Board of Trustees, namely SYDNEY J. GREEN, EUGENE OVERFELT, WILLARD H. GARDINER, JAMES S. JARDINE, WARREN E. PUGH, ROBERT H. GARFF, and KARL N. SNOW, JR. and John Does I - X,

Defendants-Respondents.

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2. Whether under Article VII, Section 16 of the Utah Constitution, the Attorney General has the exclusive right to represent UTFC?

PROVISIONS WHOSE INTERPRETATION IS DETERMINATIVE

Utah Constitution, Article VI, Section 29:

> Sec. 29. [Lending public credit forbidden.]
>
> The Legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking.

Utah Constitution, Article VII, Section 16:

> Sec. 16. [Duties of Attorney General.]
>
> The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law.

U.C.A. §§ 63-60-1 through 6. (See Appendix A).

STATEMENT OF THE CASE

This case concerns the constitutionality of the first statute in the history of this State to authorize direct use of public money for the purpose of taking an equity interest or making an unsecured loan or grant in direct aid of a private, start-up, business venture.

The Utah Technology and Innovation Act ("UTIA") was originally enacted in 1983, creating an entity known as the Utah Technology Finance Corporation ("UTFC"). No funds were appropriated to UTFC for that fiscal year. In 1985 Amendments to the Act were effected through S.B. No. 1 of the June, 1985 Special Session; both the Senate sponsor and the House manager of the bill were UTFC Trustees as well as Legislators. (R. UTFC action, 536).[1] As amended in 1985, the Act termed UTFC an "independent public corporation" and authorized it, inter alia, to make "equity investment in or direct loans to emerging and developing technological and innovative small businesses" or grants. U.C.A., 1953, §§ 63-60-4(2)(c)&(i) (Supp. 1985).[2] The purpose of the Act, according to the legislative statement added in the 1985 amendments, is to encourage "progress and increasing

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[1] The record for UTFC's action will be referred to as "UTFC action". The record for the action of the Attorney General and State Treasurer will be referred to as "AG action".

[2] The act as amended in 1985 is made Appendix A and attached hereto. The act was amended again in the 1986 General Session by S.B. No. 254, in part to remove provisions which the District Court had found unconstitutional in his Memorandum Decision of December 26, 1985. One of these provisions had required two legislators to be on the UTFC Board and one had exempted UTFC's funds from the custody of the State Treasurer.

productivity" within the State of Utah and to "create new employment opportunities." To implement the Act, the State Legislature has appropriated $3.7 million to UTFC plus an additional $891,800 for fiscal year 1986-87.

UTFC has issued a letter of intent to Venture Fund I indicating UTFC's intent to commit $1 million of public funds to purchase an unsecured limited partnership interest with a "high degree of risk" in Venture Fund I. (R. UTFC action, 6; R. UTFC action, 470, Venture Fund I subscription-memorandum-facing page, Appendix B.) Venture Fund I is a for-profit limited partnership; its only general partner is a for-profit corporation, Impetus Inc. Venture Fund I and Impetus Inc. propose to use the public money received from UTFC to subscribe to new issues of stock in selected, private, start-up, high-technology business ventures.

The District Court approved UTFC's asserted right under the Act to grant public money to selected, private, high-tech ventures, obtaining in return at most only the right to receive a 3% royalty on resulting commercial profits, if there are any. (R. UTFC action, 592-93); U.C.A., 1953, §§ 63-60-4(2)(i) and 63-60-5(1) (Supp. 1985); (R. UTFC action, 427, Paragraph 20)

The District Court correctly found that UTFC receives appropriated public funds,[3] and is an agency of state government within the Executive Branch. Memorandum Decision, Appendix C at 11, 13-14. All members of its governing board are appointed by

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[3] R. AG action, 27, Memorandum Decision, Appendix C, at 2, 14; See also, R. UTFC action, 492.

the Governor. It is, in short, a State entity run by gubernatorial appointees directed by statute to spend public moneys in ways that include making direct equity acquisitions, unsecured loans, and grants in direct aid of privately-owned, start-up, high-technology businesses.

The controversy over UTFC's constitutional authority to transfer public money to new private ventures, was precipitated by UTFC's statement of intent in November, 1984 to put $1 million of public funds in Venture Fund I.

Represented by its independent, retained legal counsel, UTFC filed a declaratory judgment action on July 19, 1985 against the Utah Attorney General, seeking a declaration that the Act is constitutional and that UTFC is lawfully authorized to spend funds appropriated by the Legislature (including appropriated funds currently in its possession) in return for equity interests in Utah high technology businesses.[4] On September 4, 1985 the Attorney General and the State Treasurer in turn filed an action seeking a declaration that the Act both on its face and as applied violates several provisions of the Utah Constitution.[5] In addition, the Attorney General and Treasurer sought a

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[4] This filing occurred 3 days after the amending bill, S.B. No. 1 of the June, 1985 Special Session, took effect.

[5] The Constitutional provisions on which the Attorney General and State Treasurer relied included the prohibition of Article VI, Section 29 against legislative authorization of the State or any political subdivision "to lend its credit or subscribe to stock or bonds in aid of any . . . private individual or corporate enterprise or undertaking", and Article VII, Section 16, which vests exclusive authority in the Attorney General to represent "state officers."

declaration that the actions of UTFC were violative of the Utah Open and Public Meetings law and therefore void, and that unexpended appropriations for fiscal year 1984-85 must be returned to the General Fund and Mineral Lease Fund.

The two lawsuits were consolidated by the District Court, and both sides moved for summary judgment.

The court ruled in the appellees' favor concerning the applicability of Article VI, Section 29's prohibition against lending the state's credit or subscribing to stock in aid of private enterprise. The principal basis for this decision was the court's conclusion that the legislation is for a "public purpose", namely "the creation of employment and encouragement of innovation" which it found to provide a "rational basis" for the private investment authorization. Memorandum Decision, Appendix C at 5.

With respect to the Attorney General's exclusive representational authority, the court held that under Hansen v. Utah State Retirement Board, 652 P.2d 1332 (Utah 1982), the state officers for whom the Attorney General has exclusive representational authority are limited to agencies "within the direct supervision of the Governor", and that UTFC does not fit in this category. Memorandum Decision, Appendix C at 11. The court also held in favor of UTFC on several other issues.

The District Court ruled in the appellants' favor that the particular contract with Venture Fund I was voidable because the decision to enter into the contract was not made in an open meeting with proper notices as required by the Utah Open and

Public Meetings law. Memorandum Decision, Appendix C at 11-12, 14. It ruled also that since UTFC was an executive agency, membership of two legislators on UTFC's Board of Trustees violated the separation of powers requirement of Article V, Section I. Id. at 13. The court further ruled that the Act's exclusion of the State Treasurer as custodian of UTFC's public funds violated Article VII, Section 15, and declared that UTFC should return its unexpended funds to the custody of the State Treasurer until such time as they are expended. Id. at 9-10, 13

The Attorney General filed a Notice of Appeal on February 11, 1986.

SUMMARY OF ARGUMENT

The features of the statute which authorize UTFC to make at-risk equity acquisitions, loans, and grants in direct aid of private, start-up, high technology, business ventures, violate the plain mandate of Article VI, Section 29 that the Legislature shall not authorize the State to lend its credit or subscribe to stock in aid of any private enterprise.

The constitutional history of this Section also makes it very clear that the features of the statute which authorize placing public money at risk in aid of private enterprise are precisely what the Framers of our Constitution meant to prohibit. The fact that the Legislature has stated a public benefit only emphasizes a square conflict between the statute and the Constitution. The unmistakable purpose of Article VI, Section 29 was to remove from the legislative prerogative decisions

concerning which at-risk loans, grants, and stock subscriptions in aid of private enterprise were in the public interest, and which were not. If that judgment had been left to the Legislature to exercise on a case-by-case basis, there would have been no need for Article VI, Section 29.

This is the first time in Utah's history that this Court has considered a statute which falls squarely within the constitutional prohibition. Past decisions of this Court are all consistent with the language and history of Article VI, Section 29. The decision of the District Court is not.

Under Article VII, Section 16 of the Utah Constitution, the Attorney General is directed to be the exclusive legal representative for UTFC. This result obtains because UTFC is a State Executive Agency under the supervisory control of State officers, because virtually all of UTFC's money is appropriated, public money, and because it is essential that the Executive Branch speak with one voice in advocating state policy.

ARGUMENT

I.

THE FEATURES OF THE UTIA WHICH AUTHORIZE PUBLIC TAXPAYER MONEY TO BE PUT AT RISK IN EQUITY INTERESTS, LOANS AND GRANTS IN DIRECT AID OF PRIVATE, START-UP BUSINESS VENTURES VIOLATE ARTICLE VI, SECTION 29, OF THE UTAH CONSTITUTION

The District Court's fundamental error is its profound misunderstanding of the significance of Article VI, Section 29 of the Utah Constitution to the at-risk equity purchase, loan, and grant features of the Utah Technology and Innovation Act.

The constitutional standard to which the lower court subjected the Section 29 issue is the most permissive standard known to constitutional law: whether the legislation has a proper "public purpose" and whether there is a "rational basis" for what the Legislature has done in an attempt to achieve that purpose. This is the standard that for the past half century courts in this country have applied to test the constitutionality of state statutes attacked as violative of substantive due process. Nebbia v. New York, 291 U.S. 502 (1934); Freeman v. Centerville City, Utah, 1003, 1005-06 (1979); Jennings v. Mahony, Utah, 485 P.2d 1404, 1406-07 (1971). The rational basis test is appropriate for substantive due process challenges because the constitutional provision on which such challenges rest is extremely broad and indefinite, capable of bringing within its unlimited sweep virtually all legislative enactments. Accordingly, the constitutional test for substantive due process challenges must be correspondingly lenient, lest courts be vested with the discretion to invalidate legislative judgments virtually at will.

But the constitutional provision that governs here is not a dragnet provision like the due process clause. Its language is narrow and precise. And the extensive history of its passage leaves no doubt that its purpose was to prevent precisely what happened here: a legislative decision placing taxpayer money at risk in direct aid of new, private businesses.

It is not often that the framers of constitutional provisions spell out their intent with such clarity and such

precision as occurred in this case. That intent having been stated so explicitly, it must prevail. As this Court stated in Jenkins v. Bishop, Utah, 589 P.2d 770, 771 (1978): "Under the universally recognized rule of construction, constitutional provisions should be interpreted and applied in accordance with what was intended by its framers."

Whether or not it is a good idea for the state to acquire an equity interest, or make an unsecured loan or grant, in direct aid of a new private corporation is totally irrelevant. Similarly irrelevant is whether using the State's money in these ways serves a public purpose. The only issue is whether these money-use features of the UTIA fall fairly within the prohibition of Article VI, Section 29 of the Utah Constitution. Both the plain language of that Section and also its legislative history clearly reveal that they do. That conclusion is also consistent with this Court's prior decisions, as well as with basic principles of constitutional and statutory construction.

Each of these supports for appellant's position will be separately examined.

A. The Plain Language of Article VI, Section 29 Controls

In deciding issues of constitutionality, courts are frequently handicapped by the breadth and vagueness of the constitutional language. Article VI, Section 29 by contrast, speaks in precise terms. It provides in its entirety:

> The Legislature shall not authorize the State, or county, city, town, township, district, or other political subdivision of

> the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph, or other private individual, or corporate enterprise, or undertaking.

There is nothing vague or uncertain about this provision. In the clearest possible language it prohibits the State from lending its credit, or subscribing to stock, in aid of any private business. Here, exactly what Section 29 prohibits is what is being attempted. UTFC issued a letter of intent to Venture Fund I indicating UTFC's intent to commit $1 million (now reduced to $700,000 according to UTFC's statement in the injunction hearing) of public money to buy a limited partnership interest involving a "high degree of risk" in Venture Fund I. In turn, Venture Fund I will spend that money to subscribe to new issues of stock in new, high-tech ventures chosen by its for-profit General partner, Impetus, Inc. UTFC also asserts the right under the Act to make grants of public money to new, high-tech ventures, obtaining in return at most only the right to receive a 3% royalty on resulting commercial profits; there is, of course, no assurance that there will be any profits.

This Court's precedents are discussed in subsection C. A summary of those precedents is relevant to the present discussion of the plain meaning of Section 29 because they show that this Court has been faithful to that plain meaning. This Court has never upheld a direct equity purchase in or direct loan or grant to a private, start-up company, using public money. As discussed below in subsection C, the Court has upheld a variety of programs under which private enterprises incidentally benefited from the expenditure of State money but the public

effect was dominant. Those cases all fall fairly within the purview of legitimate interpretation of this constitutional provision. But they do not extend Section 29 beyond the narrowest scope that its words will permit.

This statute offends the narrowest possible reading that can be given to the constitutional language. Here, unlike previous cases the Court has considered, the statute calls for "the State . . . to lend its credit or subscribe to stock . . . in aid of . . . private . . . enterprise." Here, for the first time in Utah's history, the plain language of the statute cannot be reconciled with the plain language of Section 29.

Significantly, the District Court did not even attempt to measure the direct investment features of the UTIA against the actual language of Section 29. Had he done so, he surely would not have decided this case by asking simply whether the Legislature had acted reasonably. The purpose of a constitutional provision is to remove decisions as to what is and what is not reasonable from the legislative prerogative.

At the end of the day, we are left with the reality that Article VI, Section 29, is part of the Utah Constitution. It must mean something. If Section 29 does not prohibit the venture-capital,[6] direct loan, and grant features of the UTIA then what does it prohibit? If it does not prohibit the very thing that occurred and would occur through UTFC subscription in the proposed high-risk venture fund and UTFC grants to new high-tech ventures, then what does it prohibit?

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[6] Terms used in the statute include "equity interests" (§ 63-60-4(2)(e)), and "direct capital investment" (§ 63-60-5(2)).

B. The History of Article VI, Section 29's Passage is Clear

For the foregoing reasons, the constitutional language could not be more plain. This, without more, requires a ruling in appellant's favor.

There is, however, more. Two chapters of constitutional history reveal beyond any doubt that in Utah it is unconstitutional to do what the Legislature attempted to do in the UTIA. One of those chapters was written in 1895, and the other in 1974.

1. The 1895 Constitutional Convention. This State is blessed with a remarkably detailed account of the debates that occurred during the Constitutional Convention of 1895. It is contained in the document entitled, Proceedings of the Utah Constitutional Convention of 1895 ("Proceedings").

The issue whether the Utah Legislature should be denied the constitutional power to use the State's money and credit for purposes of gifts, loans and speculative investments in private enterprise because of perceived public benefits from such schemes was one of the most intensely disputed issues of the constitutional convention. It also provided some of the highest drama and some of the most brilliant oratory.

The debate on this issue lasted over parts of four separate days, April 11, 12, 13, and 15, 1895 (April 14 was a Sunday and there was no session). The first attempt to provide such a limitation on legislative power would have required a two-thirds vote of the Legislature before direct loans or investments for private benefit could be made. That proposition failed.

(Proceedings, at 928.) The limitation presently contained in Section 29[7] was then introduced the next day. Id. at 951. And it eventually passed. Id. at 957. The following Monday a motion to reconsider was defeated. Id, at 1002-03.

Despite protestations by some that the issue was, or should be, non-partisan, most of the proponents for the limitation on private investments were Democrats, and most of those who opposed were Republicans. The differences between the two camps were cleanly identified, and any objective reading of the debates leaves no doubt that all who participated in them -- including those who favored and those who opposed -- knew that the language of this section meant what it said: if passed, the State was to stay out of the business of placing its money at risk, whether by loan, gift, or equity acquisition, in aid of any private enterprise, regardless of how great the benefit to the public from such loan, gift, or equity acquisition. Supporters of Section 29 thought that that result (keeping the State out of private ventures) would be good and opponents thought it would be bad. But no one was under any illusions as to what the result would be.

The case against Section 29 at the constitutional convention is basically the same as the argument currently advanced in favor of the constitutionality of the loan, grant and equity acquisition features of the Technology and Innovation Act.

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[7] It was Section 36 as proposed by Mr. Varian at the convention and Section 31 as it formerly appeared in the State Constitution as adopted.

George M. Cannon, one of the leading opponents, made exactly the same argument that today is made by the appellees and the lower court. He argued that the Legislature should not be restricted in deciding how the State's funds should be spent for the benefit of its citizens. "So far as I'm concerned, I am willing to leave the whole matter to the people of Utah and to their representatives in the Legislature." Id. at 905. He also pointed out, as did many others, that significant public benefits can result from the investment of public funds in private businesses, and that the Legislature should be left free to make a determination concerning whether in any particular case the public is likely to benefit or not. See, e.g., Proceedings, at 901 (Mr. Goodwin), 905 (Mr. Cannon), and 908 (Mr. James).

For present purposes the important points to note are (1) the arguments made by Mr. Cannon and his allies were the identical arguments made by the appellees and the district court, and (2) theirs was the position that the convention delegates ultimately rejected. By far the most prominent example used by both sides was the "bounty" which the Territory had apparently paid to a sugar factory in Lehi. Mr. Cannon stated: "I claim . . . that the people of Utah in dollars and cents have received more money back than was expended from the public treasury for the sugar factory bounty." Id. at 905.

This argument that private investment can yield public benefit -- and that the Legislature should be free to make its own determination on a case-to-case basis whether the public good will in fact be served by private investment -- was a consistent

theme of the opponents throughout the debate. It had also, apparently, been one of the issues during the election the preceding fall. Mr. James, one of the opponents, asserted that "this question was discussed from Saint George to Logan on the stump last fall. It is the issue that the campaign was upon, and it is the issue that buried the Democratic party from California to Maine." Id. at 907. Mr. James also relied on examples in which other countries had used their financial resources to promote private companies in the public interest. Id. at 908.

The fundamental argument of the proponents, by contrast, was that the power to tax is the most awesome power of government and that if no limits were to be placed on the power of the Utah Legislature to tax its citizens, then at least, the Legislature should be barred from using those tax monies to aid private enterprise. See, e.g., Proceedings at 894-95 (Mr. B.H. Roberts), 913-914 (Mr. Franklin S. Richards), and 911 (Mr. Samuel R. Thurman). Their view on this matter was as unqualified as was the language that they eventually succeeded in persuading a majority of the Convention to adopt. Mr. Richards asserted that no "political subdivision of the State has the right to pledge its credit or to give public money for any private enterprise, no matter what it may be." Id. at 914 (emphasis supplied).

B.H. Roberts, probably the most eloquent and prolific of the proponents, decried the evils that had fallen upon the states of Tennessee and Illinois for using their public credit for private purposes, opining that "the result had been followed with disaster, showing, sir, that this doctrine is vicious in its

results, as it is vicious in its principle." Id. at 898. Accordingly, the proponents' objective was to prevent "taking private property for private uses under any circumstances . . . and that, sir, I take it is the question that underlies the discussion that is now in progress -- the taking of private money by the strong arm of government for private uses." Id. at 923.[8]

What cannot be ignored is that in the proponents' view -- the prevailing view -- the fact that the public would benefit was immaterial. The evil that they prohibited was exactly what they said they prohibited: any use of public money which might benefit private companies. The prohibition existed regardless of the public benefit, because "corporations largely are not formed for the sole and patriotic purpose of giving employment to people, but for amassing wealth to be used by themselves personally and individually." Id. at 927 (Mr. Roberts). Thus, the purpose of the prohibition was "to prevent the pledging of the credit of the State for any private enterprise whatever." Id. at 890 (Mr. Richards).

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[8] Some of the precise consequences that the proponents of Section 29 feared have in fact come to pass under the UTIA. These include potential conflicts of interest and investment of public money in ventures which are, almost by definition, highly risky and unable to attract the usual financing sources. (For example, the State Treasurer is barred from holding this type of speculative interest by U.C.A., 1953, § 51-7-11(3) (Supp. 1985)). With regard to conflicts of interest, Mr. Evans warned that if "private enterprises and corporations can organize and apply to the State through its officials and representatives for aid, . . . a great abuse of power will naturally follow." Proceedings at 952. That those are legitimate concerns is shown by the record evidence of actual conflicts of interest that have occurred in this case and which reflect use and potential use of public moneys in ways that effect yet additional benefits to private-enterprise interests of the persons involved in the conflicts. See Paragraphs 3-10, 15-16 of the UNDISPUTED FACTS, R. UTFC action, 310-11, Appendix D.

The debate that occurred on the first day pertained to a proposal which would have limited the legislative power by requiring that public investment in private enterprises be accomplished only on a two-thirds vote. The measure which eventually passed attacked the problem from a different perspective, but the issues were the same. Mr. Cannon, speaking in favor of the motion to reconsider on Saturday, April 13, asserted, "I claim that the state has the right to use the credit that belongs to the people for the benefit of the people. I claim that it has the right to build railroads and use the credit for that purpose where the people will be directly benefited by it." Id. at 986.

And that was the issue: whether the new State was to have the power to use the State's financial resources for private purposes "where the people will be directly benefited by it." Id. That was the issue that occupied large portions of four days of the constitutional debate. And on that issue Mr. Cannon and his supporters lost, and Mr. Roberts and his supporters won. Accordingly, the issue whether there is or is not a public benefit from state investment in aid of private enterprise is simply not a relevant concern. That issue was removed from the realm of issues with which the Utah Legislature was to be entitled to deal.

Messrs. Cannon and James and Goodwin spoke to that issue with force and clarity. And they lost. To argue that the private-business-assistance features of the Utah Technology and Innovation Act are constitutional because they are based on

benefits to the public rather than private persons and entities is to attempt to re-argue the very issue that so consumed this State's Constitution Makers during the mid-April days of 1895. And there is no question that those framing fathers knew what they were doing. They were taking away from the Legislature a very significant power to make a decision concerning the public benefit. George M. Cannon and his colleagues said that the Legislature should have that power. B.H. Roberts and his allies said that they should not. To attempt now, ninety years later, to justify a statute providing for the use of public funds in direct aid of start-up, proprietary companies because of perceived public benefits amounts to nothing less than repeal of an important constitutional provision without observing the constitutional prerequisites for constitutional amendment.[9]

It would be the ultimate constitutional irony if -- in the first case falling squarely within the intendment of Section 29 -- a district court of this State were allowed posthumously to award to George M. Cannon the victory over B.H. Roberts which the Framers duly denied him.

2. The Constitutional Proposal of 1974. Twelve years ago, the advocates of giving the Legislature the authority to use public money in aid of private enterprise for public benefit

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[9] Ironically, though the District Court said of Article VII, Section 15 (duties of the State Treasurer) that its "wording could not be clearer", the court made no reference to the clarity of Section 29's wording. Similarly, with regard to Article V, Section 1 (allocation of governmental powers) the District Court spoke of what the "framers of the Utah Constitution intended" but was entirely silent as to the unusually clear intent of the framers regarding Section 29.

submitted to the Utah electorate a proposition which would have amended Section 29 in pertinent part as follows: "the Legislature shall not authorize the State, or any political subdivision of the State to lend its credit except to aid in the establishment or expansion of private industry, within the State." 1974 Utah Laws, S.J.R. No. 3 (Emphasis supplied).

The Utah voters rejected this proposed change by an almost two to one margin, 240,813 to 129,833.[10] Manifestly, if the Legislature had already had that power, there would have been no need for the proposed amendment.

The ultimate thrust of the District Court's rationale is that the Constitution can be amended by a simple majority vote of both Houses of the Legislature and the Governor's approval. This is also the approach taken by the appellees, who urged the District Court to uphold the UTIA because the Legislature has determined that it serves a public purpose. The lower court accepted that argument and converted it into the foundational premise underlying its holding: "The same electorate which establishes the Constitution also elects representatives to make its laws." (Memorandum Decision, Appendix C at 4-5).

This astounding statement is essential to the District Court's judgment and to the appellees' position in support of it. And while it is very true that "the same electorate which establishes the constitution also elects representatives to make its laws," it does not follow that the Constitution can be

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[10] R. UTFC action 309, 370-72; Paragraph 1 of UNDISPUTED FACTS, Appendix D.

disregarded by those representatives. The notion turns the very concept of a written constitution on its head. The only reason for a constitution is to limit the powers of government. And the chief governmental entity whose powers are limited is the Legislature. Under the District Court's rationale, therefore, the same Legislature whose powers are the main reason a constitution is necessary can succeed in overriding the Constitution without any resort to the amendment process. As stated by this Court in Berry v. Beech Aircraft Corp., 29 Utah Adv. Rep. 3, 8 (1985) "[t]hat kind of analysis would result in the legislative powers prevailing in every case, and would deprive . . . constitutional [provisions] of any meaningful content or force."[11]

The only response the appellees have ever made to the overwhelmingly clear language and history of Article VI, Section

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[11] This basic principle of constitutional supremacy is deeply rooted in our constitutional jurisprudence. Almost 200 years before Berry v. Beech Aircraft, the Federalist, No. 78 (written by Hamilton) stated as follows:

> No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.
>
> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution.

29, is that "it was adopted . . . to prevent state and local government from using tax money to engage in private business ventures thereby enriching private interests for no public purpose." (Respondent's Memorandum in Opposition to Appellants' Motion for Injunction, at 16.) The appellees rely on statements at the convention that in the framers' view "the public funds that are derived from the taxes of the people ought to be devoted strictly to governmental purposes, and it is with a view to accomplish that that this Section is proposed . . . ." Id. Quoted from Proceedings at 889. And they also rely on assertions by the Legislature that the direct equity acquisition, loan, and grant features of the Act are for a public purpose.

That argument serves only to emphasize how squarely the challenged money-use features of the UTIA fall within the language and the intendment of Section 29. The framers manifestly did not intend that the "public purposes" for which taxpayers' money could constitutionally be spent would mean anything that the Legislature at any given time determined it to mean. If such had been their intent, there would have been no need for Article VI, Section 29. The very purpose of Section 29 was to identify as a matter of constitutional prohibition one quite narrow type of expenditure of taxpayers' money which in the framer's judgment could never qualify as a constitutionally acceptable governmental purpose. For reasons set forth in Subsection B-1 above, if the constitutional history of Section 29 does not demonstrate this intent to exclude the power of the Legislature to spend taxpayer money for private purposes where

the Legislature determines that there is a public benefit, it demonstrates nothing at all. And the appellees' argument to the contrary effectively asks this Court to ignore the very existence of both the constitutional language and the history of its passage.

C. This Court's Cases Support the Appellants

For reasons stated, the facts of this case fall squarely within the language and intent of Section 29. Previous interpretations of Section 29 are also supportive of the language of that Section and the clearly expressed intent of those who adopted it.

This Court's precedents have allowed public expenditures only where there was no benefit to private enterprise, or where any such benefit did not involve putting public money at risk and was merely incidental to dominant public effects.[12] None of those cases involved lending of the state's "credit . . . in aid of . . . private individual or corporate enterprise."

For example, in upholding the constitutionality of the Metropolitan Water District Act, this Court said that if, after

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[12] The Court has acknowledged that the purpose of Section 29 is to prevent the use of the taxing power of the State to generate money to be put at risk for the benefit of private enterprise. Utah Housing Financing Agency v. Smart, Utah 561 P.2d 1052, 1056 (1979) ("appropriations to defray obligations of the Agency . . . would be invalid as lending the state's credit"); Utah State Land Board v. Utah State Finance Commission, 12 Utah 2d 265, 266-67, 365 P.2d 213, 214 (1961) (public money not to be invested in a "corporation or enterprise desiring to start a business").

its organization, the District in that case should "attempt to lend its credit to or subscribe for stock in any of the prohibited, private, individual, or corporate enterprises, the court would stay such prohibited action at the instance of any proper party." Lehi City v. Meiling, 87 Utah 237, 255, 48 P.2d 530, 538 (1935) (emphasis supplied).

This Court has explicitly recognized that use of public tax revenues as risk or venture capital was precisely the use Section 29 was adopted to prevent. The opinion in Utah State Land Board v. Utah State Finance Commission, 12 Utah 2d 265, 365 P.2d 213 (1961) quoted from David Evans' statement at the Constitutional Convention:

> What is loaning the credit of a state or a county or a municipality? In short it means that if any corporation or enterprise desiring to start a business, and for the purpose of aiding it the State endorses it, or rather guarantees the bond or paper of such individual or corporation . . . .

12 Utah 2d at 266-67, 365 P.2d 213 (emphasis supplied) (quoting Proceedings at 953). The distinction in Utah State Land Board which enabled the Court to uphold the statute was that the investments were to be made in "well established" securities in the interest of "the prudent handling of [public] funds", not in emerging and developing corporations "desiring to start a business," where "the element of aiding [the] enterprise is present," along with the element of risk. 12 Utah 2d at 267, 365 P.2d at 214. In that case, therefore, the money was placed in securities which not only were secure, but also whose issuer did not stand to benefit from the placement since the issuer of "well

established corporate securities" -- by definition broadly held, highly liquid and exchanged rather than originally issued -- receive no benefit from the particular placement. By contrast, recipients under UTFC's scheme are unestablished and directly benefited by their receipt of the new capital, and a limited partnership interest in a venture fund such as Venture Fund I has "no regular resale market." Affidavit of Edward T. Alter, State Treasurer, Injunction Hearing of March 17, 1986, Appendix E.

In all of the cases upholding statutes under which appropriations "incidentally benefit" private enterprises, the Court has based its findings of constitutionality on the fact that the public tax revenues were protected. Public monies were not at risk and hence there was no lending of the State's credit. Conversely, the Court has expressly stated that if resort to appropriations were legislatively established, the scheme would constitute a lending of the state's credit in violation of Section 29. See, e.g., Utah Housing Finance Agency v. Smart, Utah 561 P.2d 1052, 1056 (1979). The UTIA does set up such a scheme, and it does violate Section 29. Further, the undisputed facts show that the aid to private businesses in this case extends beyond being "merely incidental" and is, indeed, the direct and only definitely predictable aid and that will occur.

Section 29 can be construed to permit the State to make low-cost financing available to low and moderate income persons for the purpose of purchasing homes as this Court held in Utah Housing Finance Agency v. Smart, Utah, 561 P.2d 1052, 1055 (1977); or to authorize the issuance of revenue bonds. Allen v.

Tooele County, 21 Utah 2d 383, 445 P.2d 994 (1968); Tribe v. Salt Lake City, Utah, 540 P.2d 499 (1975). But its plain language will not permit any scheme in which state taxpayer money has been put at risk in aid of private enterprise. That is the constitutional dividing line. The opinion in Allen, for example, noted that the bonds involved there were to be paid only out of money derived from the project in connection with which they were issued. There was therefore, the Court reasoned, no possibility that those bonds could ever become a debt of the county.[13] In Smart, the Utah Housing Financing Agency was held to be constitutional because its authorizing statute specifically provided that the debts of the agency did not become the debts of the State. 561 P.2d at 1055. Recently, the essential elements were restated as follows: "The county's credit is not being lent nor is it otherwise at stake. Under the terms of the agreements, the Authority's debts are entirely its own." Municipal Bldg. Auth. of Iron County v. Lowder, 23 Utah Adv. Rep. 10, 15 (1985).

The instant case, by contrast, crosses the line that this Court has never permitted to be crossed. The statute at issue here permits taxpayers' money to be put at risk in aid of new private ventures. Whether that is in fact more or less desirable in a modern-day judgmental sense than the schemes at issue in Smart, Allen, Tribe, Lowder, or others is totally beside

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[13] The Court referred to this as the 'special funds doctrine." Allen, 21 Utah 2d at 386, 445 P.2d at 996; Utah Housing Finance Agency v. Smart, Utah, 561 P.2d 1052, 1055 (1977); Tribe v. Salt Lake City, Utah, 540 P.2d 499, 503-04 (1975) ("obligations of the agency . . . not a debt of the [government]" and public funds "not being given or loaned to a private person").

the point.[14] Neither those cases nor any others have ever involved what Section 29 in its narrowest reading prohibits. This statute does.

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[14] In fact, there is good evidence that the Framers' judgment is just as sound today as it was ninety years ago. The fundamental problem has not changed. The investment of public money will not likely be necessary unless the venture is so speculative that it has trouble attracting money from other sources. This, in turn, reflects the judgment of a free market economy concerning the soundness of the investment. As stated by Governor Bangerter, the American experience teaches that the best solutions have usually been found by "[p]rivate citizens who did it on their own initiative" and "without reference to any bureaucrat." State of the State Message, Utah Senate Journal, 1986 General Session of the Forty-Sixth Legislature, January 13, 1986 at 69.

The financial instability of new ventures was recognized by Mr. Evans in the Constitutional Convention as reason to establish Section 29, and by the Court in Utah State Land Board as one of the bases for its distinction between what it would allow the state to invest in ("well established corporate securities") and would not allow the state to invest in (emerging and developing, corporations "desiring to start a business"). That high-risk characteristic of new businesses, and particularly new businesses in the high technology field, is reflected in current information and experience. First, Venture Fund I's subscription memorandum itself identifies its offering as involving a "high degree of risk." (R. UTFC action, 470) Of businesses that failed over the period 1970 through 1981, 54.8 percent were five years or younger, whereas only 20.2 percent were over ten years old. The 1981 Dun & Bradstreet Business Failure Record, the Dun & Bradstreet Corporation, 1983, p. 11. With regard to high technology industries, one study concluded that, "high tech industries tend to be volatile at best, and . . . a sorting-out of competition occurs quickly compared to less technology-intense endeavors." Shanklin & Ryans, Organizing for High-tech Marketing, 62 Harvard Business Review, No. 6, 164 (1984). Arthur Rock, reported in the Wall Street Journal to have the best track record in the venture-capital business over a 25 year period and to be a scout for new high-tech talent, is quoted as stating a more basic problem: "In all of the electronic technologies now, there is nothing radically new happening . . . . [The] major productivity increase is over . . . ." The Wall Street Journal, December 31, 1985, at 5, Col. 2. According to Seymour Melman, professor of industrial engineering at Columbia University, the idea that the painful transaction "from smokestack to high technology . . . will soon bring the country back to prosperity . . .[is] a nice high-tech dream . . . [that] an increasing accumulation of evidence suggests . . . won't come true." Melman, The High Tech Dream Won't Come True, Inc., August, 1984 at 13.

This Court's recent decision in Berry v. Beech Aircraft, 29 Utah Adv. Rep. 3, (1985) dealt with another constitutional provision. But the principle announced in that case is equally applicable here, and it requires reversal of the District Court's judgment: "The plain meaning of the constitutional provision cannot be harmonized with the statute . . . in this case." Id. at 12. This Court's holding and rationale in Berry, handed down after the District Court's decision here, requires reversal of that decision. The only relevant difference is in the comparative clarity of the two constitutional provisions.

In short, what B.H. Roberts and his colleagues joined together in 1895, no Legislature can put asunder in 1985.

D. A Ruling in Appellants' Favor on the Section 29 Issue Will Avoid Additional Constitutional Issues

It is a well-settled principle that courts should avoid reaching constitutional issues if possible. Ashwander v. TVA, 297 U.S. 288 347 (1936); Malan v. Lewis, Utah, 693 P.2d 661, 663 (1984). Similarly, statutes should be given an interpretation which will avoid the necessity of even reaching a constitutional issue, so long as such an interpretation is reasonable. N.L.R.B. v. Catholic Bishop, 440 U.S. 490, 507 (1979); Kennecott Copper Corp. v. Salt Lake County, Utah, 702 P.2d 451, 457 (1985). The same general principle applies, we submit, to the interpretation of constitutional provisions. That is, constitutional provisions should be interpreted, if possible, so as to avoid the necessity of reaching other constitutional issues.

That principle applies in this case. If, as the appellees contend, Section 29 could be interpreted to permit the venture-equity, loan, and grant features of the UTIA, those features would violate other provisions of the Utah Constitution. First, the statute would violate Article VI, Section 1, Article V, Section 1, and Article I, Section 2, which vest all legislative power in the Legislature and ultimately in the people, and forbid its delegation to non-governmental entities. It would also violate Article XII, Section 1, which prohibits the creation of private corporations by a special act.

1. Delegation of Legislative Powers to Non-Government Entities. In the exercise of its statutory authority, UTFC has issued a letter of intent to invest public monies in a limited partnership, Venture Fund I, the general partner of which is Impetus, Inc., a corporation. Both Venture Fund I and Impetus, Inc. are private, profit-making entities. They are not public bodies. They have no governmental status. Yet the UTIA gives them the most potent of all governmental prerogatives: the power to spend public money.

If the constitutional assurances that legislative power is vested in the Legislature and is not to be delegated outside government mean anything at all, they must prohibit what has happened in this case. Under the UTIA the power to decide how public money is to be spent is vested totally in private persons who have no governmental status and no governmental responsibility other than spending the taxpayers' money. The only legislative involvement in the selection of the entities who

are to receive public money through UTFC is the requirement that they be "emerging and developing small businesses." (U.C.A., 1953, § 63-60-4(2)(c) (Supp. 1985). There is nothing in the statute that would prevent UTFC from favoring an applicant who is a friend or business associate of one of the board members. No limit is set on the frequency or dollar amount of awards that can be granted to any given person. Moreover, UTFC was exempted by S.B. No. 1 from many of the usual state controls (U.C.A., 1953, § 63-60-6 (Supp. 1985)), and was exempted further by amendment in the 1986 General Session from the Utah Procurement Code, which requires competitive bidding in purchasing and in the choosing of agents such as program administrators and lawyers. S.B. No. 254.

The power ultimately to decide how the money is to be spent rests in the unfettered discretion of the directors of Impetus, Inc., who are three times removed from the people by the insulating layers of Venture Fund I, UTFC, and the Legislature. This power cannot not be squared with the cited constitutional provisions as construed by this Court. Salt Lake City Firefighters v. I.A. of Firefighters, Utah, 563 P.2d 786 (1977); State v. Gallion, Utah 572 P.2d 683 (1977); Revne v. Trade Comm'n., 113 Utah 155, 192 P.2d 563 (1948); Tite v. State Tax Comm'n., 89 Utah 404, 57 P.2d 734 (1936); Western Leather & Finding Co. v. State Tax Comm'n., 87 Utah 227, 48 P.2d 526 (1935).

2. Special Acts Creating Private Corporations. If the UTFC and the business entities to which it proposes to transfer public moneys are free of the constitutional constraints on

public, Executive agencies prescribed by Section 29, then the UTFC must be deemed to be a private corporation, created by special act in violation of Article XII, Section 1. See, Oregon Railway and Navigation Company v. Oregonian Railway Company, 130 U.S. 1 (1889); Utah Farm Bureau Insurance Company v. Utah Insurance Guaranty Association, Utah, 564 P.2d 751, 754 (1977); State v. Kallas, 97 Utah 492, 505, 94 P.2d 414, 420 (1939); Nelson v. McArthur, 38 Mich. 204, 207 (1878); Oregon Cascade Railroad Company v. Bailey, 3 Ore. 164, 172, (1869). Fortunately, neither of these issues need be reached here because it is so clear that the framers of the Utah Constitution expressly prohibited putting taxpayer money at risk in aid of private businesses.

E. The Legislature's Objectives Can Be Achieved Through Alternative Means That Are Clearly Constitutional

In several contexts, the existence of other alternatives, less burdensome to constitutional values, is relevant to the constitutionality of the particular practice at issue. This principle has been applied, for example, to state-imposed burdens on interstate commerce preferential to the citizens of the imposing state,[15] to state renunciations of their own obligations in violation of the contracts clause,[16] and to a variety of First Amendment cases.[17]

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[15] Hughes v. Oklahoma, 441 U.S. 322 (1979).

[16] United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

[17] E.g., Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963).

The availability to the Legislature of other alternatives which do not raise constitutional questions is most clearly appropriate, we submit, in a case such as this one, where the Constitution speaks with such precision and clarity, and where the constitutional history leaves no doubt concerning the framers' intent.

There are several constitutionally permissible ways that the State Legislature can spend public money -- and do so in ways that in fact confer some economic benefits on Utah's citizens -- without running afoul of the constitutional prohibition against placing taxpayer money at risk in aid of private enterprise. Indeed, the Legislature authorized some of these alternatives in the UTIA itself, and since they are severable from the private venture-equity, loan and grant provisions of the Act, they are valid.

For example, UTFC has provided $300,000 to the public, non-profit, broad-based, educational and coordinating entity, the Utah Innovation Foundation. (R. UTFC action, 311) That is not a lending of the State's credit in aid of private enterprise. The Legislature may authorize the expenditure of State money in public, non-profit research and development programs, such as those at Universities. It may direct public moneys to broad-based advertising, promoting, and otherwise attracting certain types of businesses to Utah. The Legislature may also (so long as it observes other constitutional limitations) create favorable tax advantages, or provide special financing devices, such as industrial revenue bonds.

Whether it was a good idea or not to bar use of public money in aid of private enterprise is not a relevant issue for this Court nor for the Legislature. It is an issue that can be resolved only through the constitution-making process. In 1895 the Constitution Makers (the Framers) considered it a close question. In 1974, the Constitution Makers (the Voters) considered it not a close question. Until those judgments are reversed by the people of the State of Utah, the State cannot use its money to make direct equity acquisitions, loans, or gifts in direct aid of private, start-up businesses. If there are legitimate governmental objectives which the Legislature wants to accomplish it will have to look to alternative ways to accomplish those objectives. Fortunately for the Legislature, there are alternative ways.

II.

UNDER ARTICLE VII, SECTION 16 OF THE UTAH CONSTITUTION, THE ATTORNEY GENERAL HAS THE EXCLUSIVE RIGHT TO REPRESENT UTFC

Article VII, Section 16 of the Utah Constitution provides:

> The Attorney General shall be the legal adviser of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law.[18]

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[18] A Utah statute, U.C.A., 1953, § 67-5-3 (Supp. 1985) implements this constitutional mandate through its grant of powers to the Attorney General to perform "legal services for any agency of state government." The statute further provides that "'[A]gency' means any department, division, agency, commission, board, council, committee, authority, institution, or other entity within the state government of Utah." Id.

The determinative issue is whether the appellees are "state officers" within the meaning of Article VII, Section 16. This Court's decision in Hansen v. Utah State Retirement Board, Utah, 652 P.2d 1332 (1982) interpreted Section 16 to confer constitutional authority on the Attorney General to be the legal advisor to the Executive department officers over which the Executive officers referred to in Article VII have supervisory control. It also identified state funding as an indicator that the state-funded entity was an Executive agency for which the Attorney General was directed to be legal counsel. Thus, the principal relevant inquiries under Hansen are whether the entity at issue receives substantial state funding, and whether its officers are subject to the power of appointment and control of Article VII-Executive officers.[19]

The District Court correctly recognized that UTFC receives substantial state appropriations, and is an agency within the Executive Branch. Those correct premises require the conclusion that the Attorney General is UTFC's constitutionally designated counsel. The District Court erred by ruling that though UTFC is within the Executive Branch it is nonetheless "independent" and therefore not subject to the requirements of Article VII, Section 16. That ruling flies in the face of the Constitution as well as case law.

In Hansen v. Utah State Retirement Board, Utah, 652 P.2d 1332, 1334 (1982), the issue was "the meaning of the

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[19] These Article VII officers include the Governor, the State Treasurer and the State Auditor. 652 P.2d at 1337.

term 'State officers' as used in Article VII, § 16." The defendants in Hansen, each of which had specific statutory authorization to hire independent legal counsel, were: The Utah State Retirement Board, the Utah State Industrial Commission, the Utah State Insurance Fund and the University of Utah Medical Center Trust Fund. After analyzing the constitutional language as well as the nature and history of the office of Attorney General, the Court concluded as follows:

> [T]he framers intended to confer constitutional power on the Attorney General only with respect to executive department offices. Thus, the constitutional authority of the Attorney General is to act as legal adviser to the constitutional executive officers referred to in Article VII, i.e., the Governor, Lt. Governor, Auditor, Treasurer, and the Superintendent of Public Instruction [,and] the departments over which they have supervisory control . . . .

652 P.2d at 1336-37 (First emphasis in original; second emphasis supplied).

In deciding whether the defendants in Hansen were part of the Executive Department and hence the constitutional clients of the Attorney General, this Court looked primarily at who controlled the "agency" and whether it relied upon or spent state funds. Id. at 1338-40. The Court concluded that each of the defendants was outside the Executive Branch. The Court's rationale, which controls this case, was that Article VII, Section 16 was inapplicable because none of the entities in Hansen was within the supervisory control of Article VII-State officers and none relied significantly upon state-appropriated

funds for its support.[20]

The Utah Constitution, as interpreted by Hansen, requires that the Attorney General be UTFC's legal counsel. UTFC receives and relies entirely or almost entirely upon the large amounts of public money that have been appropriated to it. To the extent they exist, supervisory controls over UTFC reside essentially in the officers of the Executive Branch, and most notably the Governor.

The Governor appoints all the Trustee-board members. U.C.A., 1953, § 63-60-4(3) (Supp. 1985). One member of the Governor's office and one member of the Department of Community and Economic Development -- an Executive agency -- are ex officio members of the board. UNDISPUTED FACTS, Appendix D, Paragraph 20. UTFC is required to make an annual report to the Governor. U.C.A., 1953, § 63-60-5(7) (Supp. 1985).[21] It is subject to annual audit by the State Auditor (U.C.A., 1953, § 63-60-5(7) (Supp. 1985), and has been required to submit its public funds to the custody of the State Treasurer.

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[20] Utah State Retirement Board: "No state funds are appropriated to meet any administrative costs." 652 P.2d at 1338. Industrial Commission/Insurance Fund: "All administrative costs of the Fund are borne by the Fund itself, including attorneys fees"; "[T]here is 'a special fund separate and apart from all public moneys or funds of this state'". 652 P.2d at 1339. University of Utah Medical Center Trust Fund: "The Fund is financed solely from a portion of patient care revenues." 652 P.2d at 1340.

[21] UTFC has been exempted from many of the usual state controls. But it is not exempt from the Utah State personnel system for which the Legislature has directed that "the governor be responsible." U.C.A., § 67-19-2(1) (Supp. 1985). The 1985 Special Session expressly deleted UTFC's originally proposed exemption from the statute that governs that system. (R. UTFC action, 490)

The agency has no judicial or proper legislative functions nor any rule-making power. Rather, its stated purpose of economic development in Utah is historically an Executive prerogative, and an objective of the present Executive administration. By a simple process of elimination and the application of common sense, UTFC must be viewed as part of the Executive branch of government and not a part of either of the other two branches. Despite any contrary assertions that UTFC is "independent," its reliance on state financing and its other executive characteristics identify UTFC as an agency within the Executive Branch, and the District Court correctly so concluded. As such, its lawyer is constitutionally established to be the Attorney General.

The wisdom of the Constitution makers' judgment that the Attorney General should have the exclusive right to provide legal representation for state officers is well demonstrated by what has happened in this case. Spreading representational authority among state officers invites the kind of inconsistent advice that led the Legislature to enact S.B. No. 1. It also invites the filing of lawsuits such as the one filed by UTFC which has two defects that are relevant to the present discussion. First, for reasons stated below, UTFC's suit clearly does not meet the standards for a justiciable controversy as declared by this Court. Second, because the UTFC suit usurps a function that belongs exclusively to the Attorney General, it is necessarily based on allegations of speculation concerning actions that the Attorney General plans to take.

The Court has held that in order to establish justiciability in an action for declaratory judgment, the plaintiff must show the presence of an "invariable justiciable controversy" (also referred to by the Court as an "actual controversy") and that a "mere general contention between parties that has not been formulated in a definite controversy" is not enough. Baird v. State, Utah, 574 P.2d 713, 716 (1978). See also, Harris v. Springville City, 27 Utah Adv. Rep. 7 (1986); Kennecott Corp., v. Salt Lake County, Utah 702 P.2d 451 (1985). The complaint filed by UTFC falls far short of that standard. It contains such allegations as that the Attorney General "is charged with the responsibility" (R. UTFC action, 2-10, Paragraph 3); that he has "threatened to sue" (Id. Paragraphs 5 and 12); that he has "expressed the view" (Id. Paragraph 12); and that he has issued "public statements and advice" and created a certain alleged "climate". (Id. Paragraph 13).

By these statements, the complaint implicitly acknowledges that the crucial issue concerns the Attorney General's position and what he intends to do about it. The Attorney General should be allowed to state for himself what his position is rather than have a potential adversary state it for him.

Under the standards stated by this Court, the complaint filed by UTFC is not justiciable, and would have to be dismissed for that reason alone. In his Memorandum Decision the District Court appears belatedly to have recognized that the parties and issues involved were properly before him only on the basis of the

complaint of the Attorney General and State Treasurer. That Decision ruled only in the action brought by these appellants, and identified the Attorney General and State Treasurer as plaintiffs and UTFC and its Trustees as defendants. Memorandum Decision, Appendix C at 1. As the Court stated in Jenkins v. Swan, 675 P.2d 1145, 1151 (Utah 1983), "this Court may not issue an advisory opinion on [a] question merely to relieve . . . discomfort."

Fortunately, the Court need not reach the justiciability of the UTFC's suit because the substantive issues concerning the constitutionality of the UTIA's venture-capital scheme are properly before the Court in the suit properly brought by the Attorney General. The very existence of that clearly non-justiciable suit, however, illustrates the mischief that can result from departing from the constitutional requirement that the legal representation of Executive state agencies be invested in the State's constitutionally designated law officer, rather than splintered among whatever lawyers those agencies might select.

The performance of the Attorney General's constitutional responsibilities should not be complicated by periodically permitting state agencies to hire outside counsel whose primary responsibility runs not to the precepts of the Utah Constitution, but rather to their clients, who pay their fees. A heavy and an unnecessary burden would fall upon the orderly workings of state government if any state agency which disagreed with the Attorney General's advice or opinion were held to have

the constitutional authority and standing to hire a lawyer and sue him.[22]

Moreover, when the issue proceeds to litigation, as it has here, the orderly functioning of the Judicial Branch is also at stake. The reason is that unless representational authority is limited to the Attorney General, the courts will have to consider different advocates, each purporting to speak for the State, but each taking a different position.

The litigant that appears with greatest frequency before the Utah courts is the State of Utah. Accordingly, when the State of Utah appears before this Court or any other court of this State, more is involved than the simple resolution of a legal dispute. Two separate branches of government are performing their constitutionally designated governmental responsibilities: the Executive branch in bringing the States' cases to court, and the Judicial Branch in deciding those cases. When that happens, the Judicial Branch has the right to expect

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[22] In recognition of such practical realities, various Utah statutes grant controlling representational authority to the Attorney General. For example, under U.C.A., 1953, § 67-5-1 (Supp. 1985) it "is the duty of the attorney general [to have] the charge, as attorney, of all civil legal matters in which the state is in anywise interested." Under § 67-5-1(12), it is the duty of the attorney general to "institute and prosecute proper proceedings in any court . . . to restrain and enjoin corporations . . . from acting illegally or in excess of their corporate powers"; under U.C.A., 1953, § 52-4-9 (1981) the "attorney general . . . shall enforce [the] chapter" requiring open and public meetings of public bodies. Moreover, the Court has recognized the right, if not duty, of the Attorney General to bring suits to clarify constitutional issues. Hansen v. Barlow, 23 Utah 2d 47, 53, 456 P.2d 177, 181 (1969). See also, Feeney v. Commonwealth, 373 Mass. 359, 366 N.E. 2d 1262 (1977).

that the Executive Branch will speak with one consistent voice so that the courts can rely on one source as the advocate for State policy. This can be achieved only by faithful adherence to the constitutional principle vesting in the Attorney General the exclusive right to represent Executive state agencies.

CONCLUSION

The Constitution of Utah, framed to protect the interests of all Utahns, controls in this case. Previous to its adoption, the Framers undoubtedly had become acquainted with pressures that typically are applied against lawmakers by advocates of various private interests, such as railroads and sugar factories, to obtain money from the public till. One can be sure that such advocates argued that their particular private business projects were supported by essential public purposes, and that they should not be fettered by controls. Now, high technology development is advanced as justification for the discretionary award of public money, in aid of private, speculative, business ventures of a very narrow class. It is just such use of public money for private purposes that the Constitution was framed to prevent.

Under the Utah Constitution the Attorney General is the exclusive legal representative of UTFC and its officers. This result follows because UTFC is an agency within the Executive Branch and is financed by state-appropriated moneys, and because this result serves the public interest.

As in Rampton v. Barlow, 23 Utah 2d 383, 391, 464, P.2d 378, 383 (Utah 1970), "the statute attempts to go beyond the power granted to the legislature." Accord, Berry v. Beech Aircraft Corp., 29 Adv. Rep. 3 (1985); Matheson v. Ferry, 641 P.2d 674, 679-80 (1982).

The Attorney General is entitled to reversal of the District Court's judgment on the fourth and seventh causes of action of his First Amended Complaint, is entitled to judgment in his favor on those causes of action, and is entitled to dismissal of UTFC's Complaint.

DATED this 4th day of April, 1986.

REX E. LEE
Special Assistant Attorney General

RALPH L. FINLAYSON
Assistant Attorney General

CERTIFICATE OF HAND-DELIVERY

THIS IS TO CERTIFY that four copies of the foregoing Brief for Plaintiff-Appellant Attorney General were hand-delivered, this 4th day of April, 1986 to:

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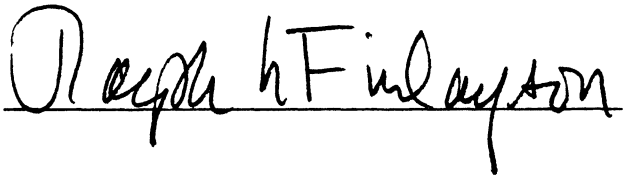

APPENDICES

APPENDIX A

Utah Technology and Innovation Act.

the application of any provision to any person or circumstance is held invalid, the remainder shall not be affected thereby."

Effective Date.

Section 19 of Laws 1982 (3rd S.S.), ch. 7 provided: "This act shall take effect upon approval." Approved January 4, 1983.

CHAPTER 60

TECHNOLOGY AND INNOVATION ACT

Compiler's Notes.

Section 11 of Laws 1985 (1st S.S.), ch. 5 provides: "The Utah Technology [and] Innovation Act is repealed June 30, 1989."

Section

63-60-1. Short title. This chapter [~~shall be~~] is known [~~and may be cited~~] as the "Utah Technology and Innovation Act."

History: L. 1983, ch. 311, § 1; 1985 (1st S.S.), ch. 5, § 6.

Title of Act.

An act relating to state affairs in general; creating the Utah technology finance corporation; and granting authority to the corporation for the contracting of, dealing in and encouragement of economic growth and improvements within the state of Utah of technological and innovative business, commercial and industrial activities with the intention of broadening the economic base within the state and encouraging the creation of jobs for residents of the state. — Laws 1983, ch. 311.

63-60-2. Definitions. As used in this chapter "small business" means small business as defined by the United States Small Business Administration, and "corporation" means the Utah technology finance corporation provided for in this chapter.

History: L. 1983, ch. 311, § 2.

63-60-3. Legislative declarations — Purpose of chapter. (1) The Utah Legislature finds and declares that:

(a) the development of innovative and high technology business in Utah is necessary to insure progress and increasing productivity in the fields of agriculture, health, safety, protection of the environment, transportation, communication, education, manufacturing, and services in this state;

(b) small and emerging businesses have a substantially greater rate of innovation and development in high technology than large and mature businesses;

(c) small and emerging businesses create new employment opportunities at a substantially greater rate than large and mature businesses;

(d) available sources of assistance and capital in this state are inadequate to assure necessary development of small and emerging businesses involved in innovation and high technology;

(e) other states and municipalities of other states have programs of governmental aid and promotion to attract and foster innovative and high technology business; and

(f) the fostering and development of innovative and high technology business in this state is necessary to assure the welfare of its citizens, the growth of its economy, adequate employment for its citizens, and progress in the fields stated in Subsection (a).

(2) It is therefore the purpose of this chapter to provide a means to encourage and foster innovation and the development of high technology, the welfare of citizens in this state, economic growth, adequate employment, and progress in the fields stated in Subsection (1)(a) by assisting and participating in (a) the organization, capital formation, management, growth, development, and disposition of small and emerging businesses, including start-up and early-stage businesses, involved in innovation and high technology, and (b) the protection, use, exploitation, licensing, and disposition or rights in the technology that they produce, all for the benefit of the citizens of Utah.

History: C. 1953, 63-60-3, enacted by L. 1985 (1st S.S.), ch. 5, § 7.

Compiler's Notes.

Laws 1985 (1st S.S.), ch. 5, § 7 repealed old section 63-60-3 (L. 1983, ch. 311, § 3), relating to establishment of the Technology Finance Corporation, and enacted new section 63-60-3.

63-60-4. Utah Technology Finance Corporation created — Non-profit corporation — Powers and authority — Board of trustees to govern corporation — Appointment of members by governor — Rulemaking authority — Employees — Legal counsel — Advisory board. (1) There is created an independent public corporation known as the "Utah Technology Finance Corporation."

(2) The corporation shall be established as a non-profit corporation. Articles of incorporation shall be filed for the corporation with the lieutenant governor. The corporation shall, subject to this chapter, have all powers and authority permitted non-profit corporations by law, including but not limited to the power and authority:

(a) to take all action necessary or desirable to encourage and assist in the research, development, promotion, and growth of emerging and developing technological and innovative small businesses throughout Utah;

(b) to establish separate funds and accounts into which may be deposited any state appropriations, public moneys, or other moneys made available to the corporation from any governmental agency, or any institution, person, firm, or corporation, public or private, and to use these funds for any of the purposes of the corporation established by this chapter;

(c) to provide from its funds matching sources of capital for equity investment in or direct loans to emerging and developing technological and innovative small businesses in accordance with this chapter;

(d) to coordinate and cooperate with state agencies and the state's political subdivisions, colleges, universities, and other academic and research sources, both private and public, agencies and entities of the United States government, and all other public or private entities;

(e) to negotiate, contract for, obtain, hold, own, grant, and otherwise dispose of, to or from individuals and public and private entities, ownership, title, rights, exclusive and non-exclusive licenses, and other interests in and to any of the following insofar as related to developments or businesses encouraged, established, or fostered through the efforts, contacts, money, or other resources of the corporation: (i) stock, partnership interests, and other ownership and equity interests in companies and projects; (ii) proprietary rights of any nature, including without limitation

patent rights, copyrights, rights in mask works, trade secrets, know-how, and trademarks; and (iii) royalties, license fees, and other similar payments;

(f) to make arrangements with various businesses and technological development companies for additional sources of funding and with federal, state, and other governmental entities, as well as private and public foundations, and other donors for sources of grants to assist the corporation and other corporations, small businesses, and high technology projects to obtain the necessary capital and other assistance to accomplish the purposes of this chapter;

(g) to invest and reinvest its funds for the purposes provided in this chapter;

(h) to expend its money for the operation of the corporation and its purposes;

(i) to contract with public and private entities and agencies, individuals, and companies, for the carrying on of the activities and powers provided in this chapter, including the granting of research contracts;

(j) to receive appropriations from the Legislature and other public moneys, as well as contributions from other public agencies, private individuals, companies, and other donors and contributors; and

(k) to seek federal and state tax exemptions, and to take all related actions, as determined by the board of trustees of the corporation.

(3) The corporation shall be governed by a board of trustees consisting of at least seven but no more than eleven trustees appointed for staggered three-year terms and consisting of the following:

(a) a member of the Utah State Senate, appointed by the governor;

(b) a member of the Utah State House of Representatives, appointed by the governor; and

(c) the remaining trustees appointed by the governor with the consent of the Senate, selected from representatives of the business, banking and finance, venture capital, engineering, scientific, academic, legal, and accounting communities and from the general public.

(4) The corporation may:

(a) adopt bylaws and rules and exercise all other powers permitted under the laws of Utah not in conflict with this chapter;

(b) hire a full-time director and all other employees which the trustees determine necessary for the conduct of the business of the corporation, and compensate the director and the other employees from the funds of the corporation or from other resources available to the corporation;

(c) hire and retain independent legal counsel; and

(d) establish an advisory board consisting of persons experienced and knowledgeable in science, business, banking, law, government, academics, and accounting, and consisting of others whom the board of trustees deems desirable to assist in the accomplishment of the purposes of this chapter.

History: C. 1953, 63-60-4, enacted by L. 1985 (1st S.S.), ch. 5, § 8.

Compiler's Notes.

Laws 1985 (1st S.S.), ch. 5, § 8, repealed old section 63-60-4 (L. 1983, ch 311, § 4) relating to the board of trustees, and enacted new section 63-60-4.

63-60-5. Criteria governing operations of corporation — Annual report — Audit by state auditor. The corporation, in connection with its operations and duties, shall comply with the following criteria:

(1) If the corporation provides money to high technology small businesses or projects in Utah [~~in the form of research contracts, unless otherwise determined by the board of trustees, royalty~~] provision shall be made for payments [~~shall be retained and provision made for ultimate~~] to the corporation related to the commercial value of the results of use of the corporation's money, in the form of royalties or otherwise, or for retention by the corporation of equity, whether upon

conversion of [~~all rights so acquired into equity in the high technology small business or project;~~] the right to such payment or otherwise.

(2) If the corporation provides money for direct capital investment in high technology small businesses or projects, the corporation shall require, as a condition thereof, matching funds from private sources in amounts at least equal to the money invested by the corporation[;].

(3) [~~The~~] Any proprietary [~~rights and interests~~] right, interest, or both, of the corporation in such high technology small businesses and projects shall remain a non-controlling minority interest[;].

(4) The corporation shall, by written contract, ensure that it is given regular status reports on the use of the money it has invested or loaned or research contracts it has awarded to high technology small businesses, and projects and on the status of the small business or project in which it has become so involved[;].

(5) The assistance and investment by the corporation in high technology businesses and projects is limited to those small businesses and projects having their primary place of business and projects, as well as their primary business operations, within Utah[; ~~and~~].

(6) The corporation [~~shall encourage~~], in encouraging the development and growth of businesses and technology [~~which are not detrimental to~~], shall consider effects on the quality of the land, air, water, or general environment of Utah.

(7) The corporation shall, following the close of each fiscal year, submit an annual report of its activities for the preceding year to the governor and the Legislature. Each report shall set forth a complete operating report and audited financial statement of the corporation during the fiscal year it covers. The state auditor shall at least once in each year audit the books and accounts of the corporation or he shall contract with a nationally recognized independent certified public accountant for this audit. The corporation shall reimburse the state auditor from available monies of the corporation for the actual and necessary costs of that audit. A copy of the audit of the independent CPA shall be submitted for review to the state auditor within 90 days after the end of the fiscal year covered by the audit.

History: L. 1983, ch. 311, § 5; 1985 (1st S.S.), ch. 5, § 9.

63-60-6. Corporation exempted from certain acts. The corporation is exempt from:

(1) Chapter 7, Title 51, the State Money Management Act;
(2) Chapter 5, Title 51, the Funds Consolidation Act;
(3) Chapter 1, Title 63, the Administrative Services Act; and
(4) Chapter 38, Title 63, the Budgetary Procedures Act.

History: C. 1953, 63-60-6, enacted by L. 1985 (1st S.S.), ch. 5, § 10.

Title of Act.

An act relating to the Utah Technology and Innovation Act; exempting the Utah Technology Finance Corporation from the Funds Consolidation Act, the State Money Management Act, the Administrative Services Act, and the Budgetary Procedures Act; clarifying the authority and functions of the corporation; providing for repeal of the act; and providing an effective date. — Laws 1985 (1st S.S.), ch. 5.

Amends: 51-7-4, 51-7-11, 63-60-1, 63-60-5.

Enacts: 51-5-4.5, 63-1-10.5, 63-38-9.5, 63-60-6.

Repeals and reenacts: 63-60-3, 63-60-4.

Effective Date.

Section 12 of Laws 1985 (1st S.S.), ch. 5 provided: "This act takes effect upon approval by the governor, or the day following the constitutional time limit of Article VII, Sec. 8 without the governor's signature, or in the case of a veto, the date of veto override." Approved July 16, 1985.

APPENDIX B

Venture Fund I Subscription-Memorandum-

Facing Page.

CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM

UTAH TECHNOLOGY VENTURE FUND I

(A Utah Limited Partnership to be formed)
300 Limited Partnership Units ($15,000,000)
$50,000 Per Unit
Minimum Subscription: 2 Units (1)

THE LIMITED PARTNERSHIP UNITS (THE "UNITS") OFFERED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND ARE BEING OFFERED AND SOLD IN RELIANCE UPON EXEMPTIONS FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT. SUCH UNITS HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION, ANY STATE SECURITIES COMMISSION OR OTHER REGULATORY AUTHORITY, NOR HAVE ANY OF THE FOREGOING AUTHORITIES PASSED UPON THE MERITS OF THIS OFFERING OR THE ACCURACY CR ADEQUACY OF THIS CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

AN INVESTMENT IN THE UNITS INVOLVES A HIGH DEGREE OF RISK AND IS SUITABLE ONLY FOR INVESTORS OF SUBSTANTIAL MEANS WHO HAVE NO NEED FOR LIQUIDITY IN THEIR INVESTMENTS. (SEE "INVESTOR SUITABILITY STANDARDS" AND "RISK FACTORS".) SUCH RISKS INCLUDE RISKS RESULTING FROM THE FACT THAT THE BUSINESS TO BE ENGAGED IN BY THE PARTNERSHIP WILL BE WITHIN CERTAIN BROAD GUIDELINES, IN THE SOLE DISCRETION OF THE GENERAL PARTNER. SEE "PROPOSED ACTIVITIES" AND "MANAGEMENT". RESTRICTIONS ARE IMPOSED ON THE TRANSFERABILITY OF THE UNITS AND PURCHASERS THEREOF MUST BEAR THE ECONOMIC RISK OF THEIR INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.

General Partner:
Impetus, Inc.

419 Wakara Way
Salt Lake City, Utah 84108
(801) 582-1482

November 15, 1984

Prospective Investor: _____

Copy No. _____

APPENDIX C

Memorandum Decision of the Third District Court.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DAVID L. WILKINSON, Attorney General for the State of Utah, et al.,	:	MEMORANDUM DECISION
	:	CIVIL NO. C-85-5885
Plaintiffs,	:	
vs.	:	
UTAH TECHNOLOGY FINANCE CORPORATION, and its Board of Trustees, namely SYDNEY J. GREEN, EUGENE OVERFELT, KEITH WHISENANT, WILLARD H. GARDINER, JAMES JARDINE, WARREN E. PUGH, and KARL N. SNOW, JR., and John Does I-X,	:	
Defendants.	:	

In 1983 the Utah Legislature enacted Utah Code Ann., Section 63-60-1, et seq. (hereinafter "the Act"), and created the Utah Technology Finance Corporation (hereinafter "UTFC").

The Act established UTFC as an "independent public corporation" with a board of trustees appointed for three year terms by the Governor, with the advice and consent of the Senate. It was given authority to retain independent legal counsel, and establish separate accounts into which its funds could be deposited. It was empowered, among other things, to invest in or loan money to emerging "high tech" businesses. The purpose of this, according to the legislative findings, is to encourage "progress and increasing productivity" within the state of Utah, and to "create new employment

opportunities." The legislature appropriated $1.2 million to UTFC for fiscal year 1984-85, and $2.0 million for fiscal year 1985-86.

UTFC has proceeded to exercise its statutory authority by committing to make a substantial investment of public funds in a limited partnership called Venture Fund I. UTFC has retained independent legal counsel and deposited its appropriated funds into a commercial bank.

UTFC has filed a declaratory judgment action seeking a declaration that the Act is constitutional. The Attorney General and the Utah State Treasurer have also filed an action seeking a converse declaration. The two lawsuits have been consolidated, and both sides have moved for Summary Judgment.

The Attorney General argues that the Act violates Article VI, Section 29; Article V, Section 1; and Article VI, Section 1 of the Utah Constitution. The Treasurer takes the position that the authorization of UTFC to deposit its funds into a commercial bank is a violation of Article VII, Section 15. The Attorney General also takes the position that the authorization of UTFC to hire independent counsel is a violation of Article VII, Section 16. Finally, the Attorney General argues that UTFC must comply with the Utah Open and Public Meetings Law; that the appropriation for fiscal year 1984-85 lapsed, not having been expended at the end of that fiscal year, and is returnable to the State

Mineral Lease Fund; and that the title of Senate Bill No. 1, which amended the statute in 1985 was not sufficiently clear, and the statute is therefore unconstitutional on that basis. In the alternative the Attorney General argues if UTFC is not a public entity, then the Act is unconstitutional as a violation of Article XII, Section 1.

I. ARTICLE VI, SECTION 29 - INVESTMENT IN PRIVATE ENTERPRISE

Article VI, Section 29, provides:

> The Legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to lend its credit or subscribe to stocks or bonds in aid of any railroad, telegraph or other private individual, or corporate enterprise, or undertaking.

The purpose of this constitutional restriction is to insure that public funds are spent for public purposes. Most state constitutions have similar restrictions, although they may be stated in less specific terms. For example, the Connecticut constitution provides that "no man or set of men are entitled to exclusive public emoluments." The literal words of these provisions little resemble Article VI, Section 29, but the concept is the same and the analysis used in interpreting them is also the same.

Courts look to whether the legislation is for a "public purpose." If it is, the legislation does not offend the constitution, even though there may be incidental benefit to private

interests. The Utah Supreme Court held in Utah Housing Finance Agency v. Smart, 561 P.2d 1052 (1977):

> While it is improper to spend public funds for private purposes, such private benefits incidental to a dominant public purpose do not detract from the constitutionality of the legislation.

561 P.2d 1055.

For example, the Treasurer may invest public funds at interest while they are within his custody. The purpose of such a procedure is to earn interest for the state; but the banks or businesses which receive the investments also benefit. The standard to be used is whether the primary purpose is to benefit the public or whether it is to benefit a private interest.

The legislative findings of a public purpose are entitled to great weight. The legislature found that "presently available capital in Utah is inadequate to assure the development of small and emerging businesses in the field of high technology" and that "the development of such businesses is necessary to create new jobs in competition with sister states, and to insure progress and increasing productivity in Utah's agriculture, mining and minerals development, health, safety, environmental protection and other services and industries." Utah Code Ann., Section 63-30-3(1)(a) and (d).

Legislators, as well as judges take an oath to uphold the constitution. The same electorate which establishes the constitution

also elects representatives to make its laws. It is not for the courts to question the motives of the legislature, or to second guess the basis for its findings. A legislative finding of a public purpose will withstand constitutional challenge if it has a rational basis and is not manifestly specious. Obviously, the creation of employment and encouragement of innovation is a rational public goal. Some may disagree with the legislative findings, but the findings are certainly not wholly specious. The Utah Technology and Innovation Act, therefore, does not offend Article VI, Section 29 of the Utah Constitution.

II. ARTICLE V, SECTION 1 - SEPARATION OF POWERS

The Utah Constitution, like the United States Constitution, adopts the concept of separation of powers. The United States Constitution, however, does not do so explicitly; rather it outlines in broad terms the functions of the three branches of government. In contrast, the Utah Constitution explicitly provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Constitution, Article V, Section 1

Although Utah cases have dealt with various issues relating to "independent agencies," so far as I am aware, no Utah case has answered this question: May governmental authority be exercised by an agency or board which is outside of the three branches of government?

For example, in Hanson v. Utah State Retirement Board, the court considered the functions of several state agencies, and concluded:

> None of the defendant agencies as such is an executive department agency. For various reasons the legislature has established the Industrial Commission, the State Retirement Board, and the retirement funds it administers, and the State Insurance Fund as independent agencies.

652 P.2d at 1340.

The Hanson case, however, was concerned exclusively with the question of whether such an "independent agency" was authorized to retain private counsel. The issue of whether an agency independent of the Executive can exist at all was never considered.

In Rampton v. Barlow, 23 Utah 2d 383, 464 P.2d 378 (1970) the court said:

> [T]he legislative branch should make the law, the judicial branch should be confined to interpreting it and all other power must of necessity be vested in the executive branch, which is charged with the enforcement of the law, the protection of the state's property, and the looking after the health, welfare, and peace of the people.

23 Utah 2d at 390, 464 P.2d at 383

The framers of the Utah Constitution intended that there should be three, and only three branches of government. All governmental power must be exercised through one of these three branches. The Utah Technology Finance Corporation is within the Executive Department. That is not to say, of course, that it has no right to exist; only that it is bound by the same constitutional restrictions as other executive departments, boards and agencies. Justice Moffat stated the principle well in his opinion in Chez v. Industrial Comm'n, 90 Utah 447, 458, 62 P.2d 549, 554 (1936):

> If the Legislature may create some floating entity without ancestry, set it going as an orphan institution under the administration of a state-created board, agency, commission or what not, acting for and on behalf of the state, and that agency may do things under a legislative enactment which the Legislature is prohibited from enacting under the limitations of the Constitution, the constitutional limitations or prohibitions or mandates become easy of evasion and their existence a mere matter of words to be ignored or disregarded whenever the desire to accomplish a given purpose may suggest a convenient procedure.

The Attorney General correctly argues that UTFC must necessarily be within the executive department, and be bound, therefore, by the same constitutional restrictions as other executive departments. He has not argued, however, which of these restrictions he believes to be applicable. I would think that allowing legislators to serve on the board of trustees of UTFC is probably

a violation of Article V, Section 1. There may be other constitutional provisions which limit UTFC's powers.

III. ARTICLE VI, SECTION 1 - DELEGATION OF LEGISLATIVE POWER

The legislature may not delegate its essential functions to the executive branch. For example, it may not allow the executive branch to criminalize conduct State v. Gallion, 572 P.2d 683 (Utah 1977); or impose a tax, Western Leather & Finding Co. v. State Tax Comm'n, 87 Utah 277, 48 P.2d 526 (1935).

The Attorney General objects to the provision of the Act which allows UTFC to invest funds at its own discretion. This, he argues, is a delegation of the essential legislative function of appropriation.

Salt Lake City v. I.A. of Firefighters, 563 P.2d 786 (Utah 1977), held that an act allowing binding arbitration in municipal labor disputes was unconstitutional. The key element in this case is that the arbitrators could set wages and conditions of employment at any level; perhaps even requiring a tax increase. The Act before the Court is different. UTFC does not have the ability to set the level of expenditure; it has the right to determine the apportionment of funds allocated by the legislature.

Certainly it would be an impermissible abdication of legislative responsibility to allow the executive branch complete discretion in the allocation of funds. The legislature is not required, however, to designate the specific use of every penny. It is

sufficient if reasonably specific standards and methods of accountability are employed. Section 63-30-5, sets forth the criteria for use of corporation funds. They require that private sources provide, at least, equal matching funds; that the corporation remain in a non-controlling minority position; that the corporation insure that it receive status reports; investments are limited to Utah businesses; and the Act requires UTFC to consider effects on the quality of land, air, water, and general environment.

The statute also requires an annual report to the Governor and legislature. It requires an annual audit by the State Auditor or a CPA.

I believe, and hold, that the standards and safeguards set forth in the Act are sufficiently specific to limit discretion to a degree which places the Act within the limits of the constitution.

IV. ARTICLE VII, SECTION 15 - THE DEPOSIT OF FUNDS INTO A COMMERCIAL BANK

Article VII, Section 15, of the Utah Constitution provides:

> The State Treasurer shall be the custodian of public monies; and shall perform such other duties as provided by law.

The wording could not be clearer. Merely allowing the Treasurer to approve depositories or checks does not make the Treasurer the custodian of the funds as the constitution requires. This is not to say that the legislature may not exclude UTFC

from the State Money Management Act or any other legislative restriction. Nor is it to say that the legislature may not allow UTFC to invest and reinvest its public funds. But when the funds are not actually invested for the purposes of the Act, they must be in the custody of the Treasurer, not in an institution selected by UTFC as Section 63-30-4(2)(b) would seem to allow.

V. ARTICLE VII, SECTION 16 - INDEPENDENT COUNSEL

Article VII, Section 16 of the Utah Constitution provides:

> The Attorney General shall be the legal advisor of the state officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law.

The Utah Supreme Court interpreted the vague term "state officers" in Hanson v. Utah State Retirement Board, 652 P.2d 1332 (Utah 1982):

> [T]he constitutional authority of the Attorney General is to act as legal advisor to the constitutional executive officers referred to in Article VII, i.e., the Governor, Lt. Governor, Auditor, Treasurer, and a Superintendant of Public Instruction, the departments over which they have direct supervisory control, and to the other state executive offices referred to in Article VII, insofar as the officers of those offices act within the scope of the duties of such office.

652 P.2d at 1336-37.

The court also cited with approval State v. Yelle, 52 Wash.2d 856, 329 P.2d 841 (1958) where the Washington Supreme Court

interpreted a substantially identical constitutional provision to apply only to elected officials.

Once it is determined that the legislature may establish an agency which is essential executive in nature, but is not within the direct supervision of the Governor, the same policy reasons and the same legal analysis apply to the question of whether independent counsel may be retained. The same arguments for independence from the Governor apply to independence from the Attorney General. If the legislature may create such an agency without violating the duties and prerogatives of the Governor, it may authorize independent counsel without violating the duties and prerogatives of the Attorney General. UTFC may exist within the Executive Branch of the government, outside the direct supervisory control of the Governor, and it may retain independent counsel without violating Article VII, Section 16.

VI. UTAH CODE ANN., SECTION 52-4-1, ET SEQ., (1981) - OPEN AND PUBLIC MEETINGS

The Open and Public Meetings Law applies to any "public body." "Public body" is defined as "any administrative, advisory, executive or legislative body of the state or its political subdivisions which consist of two or more persons that expends, disburses or is supported in whole or in part by tax revenue and which is vested with the authority to make decisions regarding the public's business."

UTFC is a public body. It is subject to the Open and Public Meetings law.

The Attorney General argues that the contract with Venture Fund I, the decision to seek revised legislation, and the decision to sue for delcaratory judgment are void, not having been made at public meetings. The Legislature is clear that the actions are "voidable" rather than "void." The latter two decision have been completely implemented and are therefore moot. The contract with Venture Fund I, however, is voided. UTFC will have to ratify its decision at a public meeting, with appropriate public discussion prior to proceeding with the Venture Fund I proposal.

VII. UTAH CODE ANN., SECTION 63-38-8 - UNEXPENDED FUNDS

Utah Code Ann., Section 63-38-8 provides:

> The state fiscal officer shall, on or before July 31 of each fiscal year, close out to the proper fund or account all unexpended balances of appropriations made by the legislature . . . .

UTFC was exempted from this provision, effective July 19, 1985. As I read this statute, the critical date is July 31. Because UTFC was exempted prior to that date, the statute did not apply in 1985, and the appropriation did not lapse.

VIII. ARTICLE VI, SECTION 22 - THE TITLE OF SENATE BILL 1

Without going into detail, I find that the title of Senate Bill 1 expresses the subject of the Bill with sufficient clarity

and does not violate Article VI, Section 22.

IX. ARTICLE XII, SECTION 1 - CREATION OF A PRIVATE CORPORATION

The Attorney General argues that if UTFC is found not to be a branch of government, then it is a corporation created by the legislature in violation of Article XII, Section 1.

Since I hold that UTFC is a public body within the executive branch of the government, this argument does not apply.

CONCLUSION

The Utah State Treasurer must be the custodian of funds appropriated by the Utah Legislature to UTFC. UTFC is an independent agency within the executive branch of the government. Members of other branches of the government may not serve on its board of trustees. With these two exceptions, which I find to be minor, and separable, the Act withstands constitutional scrutiny. With the two exceptions just mentioned, judgment will be granted declaring:

> (a) That UTFC is lawfully constituted to undertake the purposes enumerated in the Act; and
>
> (b) That UTFC is lawfully authorized under the terms of the Act and the Utah Constitution to invest the funds appropriated by the legislature, including the appropriated funds currently in its possession, together with funds otherwise lawfully acquired by it, in return for equity interests in Utah

> high technology businesses, for the principal purpose of advancing the public policy declared in the Act, and subject to limitations contained in the Act;
>
> (c) UTFC is entitled to retain its own independent legal counsel;
>
> (d) UTFC's contract with Venture Fund I is voidable because the decision to enter into the contract was not made in compliance with the Utah Open and Public Meeting statute. Before UTFC can proceed on such a contract, it will have to hold an open meeting with proper notices as required by the Utah Public Meeting statute;
>
> (e) UTFC should return its unexpended funds to the custody of the State treasury until such time as they are expended.

The Attorney General and the Treasurer are granted Summary Judgment as to their second cause of action, to the extent of a declaration that UTFC is within the Executive Branch of the government; their third cause of action; their eighth cause of action to the extent that the transaction with Venture Fund I cannot proceed without a proper public meeting. UTFC is granted Summary Judgment as to the following causes of action in the Attorney General's Complaint: First cause of action; second cause of action to the extent that the Attorney General requests a declaration that UTFC has no constitutional basis for existence; fourth cause of action; fifth cause of action; sixth cause of action; seventh cause of action; eighth cause of action to the extent that the Complaint asks that the legislation

be declared void and UTFC's lawsuit declared unsustainable because the decisions to pursue these actions were made in closed meetings; and the tenth cause of action.

Mr. Sullivan is requested to prepare an appropriate Order, and submit it to Mr. Finlayson and to Mr. Hunt for approval as to form.

Dated this 26 day of December, 1985.

Scott Daniels

SCOTT DANIELS
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINCKLEY
Clerk
By [illegible] Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 26 day of December, 1985:

Ralph L. Finlayson
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Harold G. Christensen
George A. Hunt
Attorneys for Plaintiffs
10 Exchange Place, 11th Floor
P. O. Box 3000
Salt Lake City, Utah 84110

Alan L. Sullivan
P. O. Box 3400
Salt Lake City, Utah 84110-3400

APPENDIX D

Undisputed Facts of Attorney General and State Treasurer Stated in Connection with Cross-motions for Summary Judgment.

appointment of its own legal counsel, and S.B. No. 1 upon which the appointment is based, unconstitutional?

7. Does the long title of S.B. No. 1 unconstitutionally fail to clearly express the subject of the bill insofar as it exempts UTFC from State Treasurer and Attorney General involvement?

8. If UTFC is not a public entity within the Executive branch of government subject to public management and control, does UTFC then subsist unconstitutionally as a corporation created by a special act?

9. Is the prohibition of Utah Const. art. VI, § 29 against lending the state's credit violated by S.B. No. 1 and by certain uses to which UTFC puts its public-source moneys.

UNDISPUTED FACTS

The undisputed facts necessary for the resolution of the issues presented in this motion are as follows:

1. The statewide Utah electorate rejected a 1974 proposition to allow the Legislature to authorize the State or any political subdivision of the State, to lend its credit "to aid in the establishment or expansion of private industry, within the State." The vote to reject that proposition was 240,813 (against) to 129,833 (for).[1]

2. The Utah Technology and Innovation Act of 1983 was

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[1] A certified copy of the return showing the rejecting vote-tally and a copy of the proposition, taken together, constitute Exhibit 1, annexed hereto.

amended by S. B. No. 1.[2]

3. In November, 1984, UTFC issued a letter of intent to Venture Fund I indicating its intent to commit $1 million to purchase an unsecured limited partnership interest in Venture Fund I on certain conditions.

4. Don A. Stringham, while a UTFC Trustee, moved in a September 23, 1983 meeting "to establish a combined venture fund with private and the public monies of the corporation."

5. Don A. Stringham is a principal shareholder in Impetus, Inc., which is the general partner of Venture Fund I.

6. Impetus, Inc., under the UTFC-Venture Fund I deal, would receive as compensation a fee equal to 2% of paid in capital and an annual management fee of at least $100,000.

7. At the time UTFC chose Venture Fund I, with Impetus, Inc., as general partner, John M. Scowcroft was both a UTFC Trustee and a director and principal shareholder of Impetus, Inc.

8. At the time UTFC chose Venture Fund I, with Impetus, Inc. as general partner, Wayne S. Brown, a former UTFC Trustee, was the chairman of the Board of Directors and a principal shareholder of Impetus, Inc.

[2] Act of July 16, 1985, S. B. No. 1, First Special Session (to be codified at Utah Code Ann. § 63-60-1 through -6) (Sections of S.B. No. 1 are hereinafter cited by the section numbers they are to be codified under with the notation "S. B. No. 1"). A copy S.B. No. 1 is annexed as Exhibit 2.

9. A member of the law firm representing UTFC in this litigation, David L. Gillette, is a director of Impetus, Inc.

10. UTFC obtained office space from a company in which one UTFC Trustee, Don A. Stringham, had a financial interest as an investor.

11. In 1984 UTFC committed to pay out, or committed to pay out and paid out, to Utah Innovation Foundation (UIF) $150,000 of public-source funds.

12. At the time of the commitment or payout or both referred to in the immediately preceding paragraph, one UTFC Trustee, Don A. Stringham, was a UIF Trustee, and one former UTFC Trustee, Wayne S. Brown was a UIF Trustee.

13. An additional $150,000 has been or soon will be paid by UTFC to UIF.

14. At the present time, Karl N. Snow, Jr., is both a UTFC Trustee and a UIF Trustee.

15. Eugene Overfelt is both a UTFC Trustee and a Senior Officer in Commercial Security Bank (CSB).

16. CSB has been to the present, or until very recently, the depositor for all of UTFC's received and as-yet-unspent funds.

17. UTFC received $1.2 million of state public monies in fiscal year 1984-85, was appropriated $2.0 million of state public monies for fiscal year 1985-86, and was appropriated

through the State in fiscal year 1984-85 an additional $500,000 of federal funds.

18. All meetings of UTFC have been held without any notice of the type required under Utah Code Ann. §§ 52-4-1 through 52-4-9 (1981) having been given.

19. One million and twenty thousand dollars appropriated to UTFC under ITEM 75 of H. B. No. 183 of 1984 was unexpended as of the end of the 1984-85 fiscal year.

20. One member of the Governor's staff and the Executive Director of the Executive agency, Department of Community and Economic Development, are ex officio members of the UTFC board.

21. The financing arrangement between UTFC and Venture Fund I does not provide for the issuance of bonds payable only out of revenues of the aided enterprise, but provides for direct unsecured investment in private businesses of the money Venture Fund I received from UTFC.

22. The results of feasibility programs of companies that have been awarded grants under UTFC's Utah Small Business Innovation Program, including but not limited to ideas regarding innovative processes, products, services, basic research, manufacturing or marketing, are not public domain.

23. The State does not receive, through UTFC or otherwise, fair legal consideration in return for grants made by

UTFC under its Small Business Innovation Program or other programs.

DISPUTED "FACTS"

The assertions of UTFC in its section entitled FACTS are disputed as follows:

1. Responding to paragraph 1, Utah Code Ann. §§ 63-60-3(1)(d) and 63-60-3(1)(a) do not read as UTFC has paraphrased them, but are rebuttable legislative statements that speak for themselves.

2. Responding to paragraph 2, Utah Code Ann. §§ 63-60-4 does not read as UTFC has paraphrased it, but contains rebuttable legislative statements that speak for themselves.

3. Responding to paragraph 4, the implication of lawfulness of UTFC's "authority" to invest is disputed.

4. Responding to paragraph 5, the implication that the legal questions regarding Venture Fund I will be resolved in favor of UTFC is disputed.

INTRODUCTION

I. CONSTITUTIONAL SUPREMACY

It is axiomatic that when there is conflict between the *Constitution and statutory provisions, the Constitution prevails.* It is not here disputed that courts will harmonize a statute with constitutional provisions when that is reasonably possible. But the Court has repeatedly stated, in the course of striking

APPENDIX E

Affidavit of Edward T. Alter, State Treasurer, Injunction Hearing of March 17, 1986.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

UTAH TECHNOLOGY FINANCE CORPORATION, Plaintiff-Respondent, -vs- DAVID L. WILKINSON, Attorney General of Utah, Defendant-Appellant,	AFFIDAVIT OF EDWARD T. ALTER, STATE TREASURER FOR THE STATE OF UTAH
DAVID L. WILKINSON, Attorney General, for the State of Utah, and EDWARD T. ALTER, State Treasurer for the State of Utah, Plaintiffs-Appellants, -vs- UTAH TECHNOLOGY FINANCE CORPORATION, and its Board of Trustees, namely, SYDNEY J. GREEN, EUGENE OVERFELT, WILLARD H. GARDINER, JAMES S. JARDINE, WARREN E. PUGH, ROBERT H. GARFF, and KARL N. SNOW, JR., and John Does I-X, Defendants-Respondents.	Case No. 860097

EDWARD T. ALTER, having been duly sworn, deposes and states:

1. I am State Treasurer for the State of Utah. I make this affidavit on the basis of my personal knowledge.

2. I do not hold any interests in Venture Capital funds in behalf of the State because I am barred from doing so under U.C.A., 1953, § 51-7-11(3) (1985 Supp.).

3. There is no regular resale market for limited partnership interests in Venture Capital funds.

DATED this 17th day of March, 1986.

Edward T. Alter

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On this 17 day of March, 1986, there personally appeared before me EDWARD T. ALTER, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

Harvard R. Hinton
NOTARY PUBLIC
Residing at: Lehi, UT

My Commission Expires:
Oct. 4, 1987

HARVARD R. HINTON
Notary Public State of Utah
My Commission Expires Oct 4, 1987
I Reside in Lehi, Utah

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Affidavit of the State Treasurer, and the accompanying letter to Mr. Butler to:

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Alan L. Sullivan
Patrick J. O'Hara
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